Supreme Court, U.S.
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No. 90-1456

In The

Supreme Court of the United States

October Term, 1990

FREDRIC GERSON LEVIN,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Florida

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an attorney, an officer of the court, can be disciplined where he engaged in betting activities illegal under Florida law, where he stated on his own television show that placing bets on football games is an acceptable recreational activity and that he knew he was committing a misdemeanor offense by placing such bets, where he advised his local Grievance Committee that breaking such a law is permissible where the law is a bad one to begin with, and where he conspired with third-parties to enable them to place illegal bets.

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STATEMENT OF THE CASE

Petitioner's Statement of the Case contained in his Petition for Writ of Certiorari fails to convey all of the facts necessary to a complete understanding of this matter. Respondent The Florida Bar therefore provides the following verbatim findings of fact of the Referee assigned to conduct the disciplinary proceedings according to the Rules Regulating The Florida Bar, as a result of the hearing held on January 16-17, 1990, in Pensacola, Florida. The Report of Referee is appended hereto at the Appendix.[1]

> The Petitioner routinely engaged in illegal gambling activities involving placing bets on the outcome of football games. This occurred over a period of time of at least five years through late 1986. The Petitioner placed his wagers through a bookmaker in the Pensacola, Florida area. The wagers ranged between $500.00 and $2,000 nearly every weekend during the 1986 football season with some weekend totals reaching upwards of $6,000.
>
> The Petitioner was aware that betting on football games was and is illegal in the State of Florida. Section 849.14, of the Florida Statutes makes it a second degree misdemeanor. He viewed betting on football games as his form of recreation. He expressed the attitude that it was an activity engaged in by many residents in the state and that the law was not routinely enforced.
>
> Capt. Gerald Gigon and his wife Patricia were friends of the Petitioner. Mrs. Gigon had

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[1] The term "Petitioner" has been substituted for the term "Respondent" to conform the findings of fact in the Report of Referee to the references in this brief.

also consulted with the Petitioner concerning an unrelated legal matter from an accident in North Carolina. During a social conversation the Petitioner casually mentioned that he bet on football games. Capt. Gigon and his wife apparently had been interested in learning how to place bets on football games for quite some time and requested his help.

The Petitioner facilitated the Gigons in placing bets. He did not, however, entice them to engage in this activity. When it became too costly for them, he urged they stop.

Initially, the Petitioner placed bets for the Gigons through his bookmaker. Thereafter, he provided the Gigons with the bookmaker's telephone number and they began placing their own bets.

At least with respect to the Gigons, the Petitioner permitted bets to be delivered to his law office in Pensacola, Florida and the payoffs as well. It appears other wagers including his and his brother's went through the office

The Petitioner's illegal betting activities did not cease until late fall 1986 when his bookmaker was arrested.

On or about March 5, 1987, and again on August 19, 1987, the Petitioner appeared on his own television show "LAWLINE", as televised on "BLAB TV," a local television station in Pensacola, Florida.

During both aforementioned television shows, the Petitioner stated that he engaged in illegal gambling activities by placing football bets with a bookmaker. During the August 19, 1987 show, he asserted his belief on camera that placing bets on football games with a bookmaker was an acceptable recreational activity.

He further admitted he knew he was committing a misdemeanor offense by placing such bets.

The Petitioner testified before the First Judicial Circuit Grievance Committee "A" on September 20, 1988, that if he had the opportunity to place bets on football games, he would continue to do so.

At least six (6) other attorneys in the Pensacola area also were involved in placing similar illegal bets in varying degrees. Of these, two received private reprimands and the remainder were not disciplined by the Bar. The details of each case are not known to this Referee.

Petitioner argued that the grievance committee conspired to embarrass him publicly. I find little evidence of this in the record. It appears the Petitioner's attitude at the time may have differed considerably from that of the other attorneys who received lesser or no discipline. He saw nothing wrong with breaking the law because he felt it was a bad law to begin with. Furthermore, he aired his views publicly through his television program. Further, although the Petitioner denied he was advocating breaking the law, he must have been aware his stature in the community could foster that impression as opposed to merely airing his opinion.

I find that the Petitioner repeatedly engaged in illegal gambling over a lengthy period of time involving a substantial amount of money. Petitioner is an officer of the Court and as such is sworn to uphold the laws of the State of Florida. It is not acceptable for a member of the Bar to simply ignore a law with which he does not agree. Rather, he should work to have the law repealed by the State Legislature which, by his own admission he has not done.

I recognize that the Petitioner has a long and distinguished career in the practice of law. He has made many contributions to the community. Good deeds, however, do not excuse his routinely engaging in conduct he admittedly knew to be illegal.

SUMMARY OF ARGUMENT

Initially, it must be noted that Petitioner is not arguing that he is immune from any type of discipline by Respondent. Rather, he argues that he has been selectively prosecuted solely because he expressed an opinion. However, there is no factual basis in this record to compare and contrast Petitioner's situation from that of six (6) other attorneys in the Pensacola, Florida area who were charged with similar illegal betting activities. The record does demonstrate that Petitioner conspired with third parties in their efforts to place similar illegal bets, that he engaged in illegal gambling over a lengthy period of time involving a substantial amount of money, and that he expressed no remorse for his activities even though he fully understood their import. Accordingly, given these other equally valid and compelling non-constitutional issues for imposing a slightly harsher sentence on Petitioner, this Court need not address the First Amendment concerns raised by Petitioner.

Even were it to find some First Amendment implications in Petitioner's conduct and statements, the Court should still not accept jurisdiction over this cause. Those First Amendment implications, if any, are not substantial

and are more than outweighed by Respondent The Florida Bar's legitimate interest in ensuring that attorneys, officers of the court, engage in conduct consistent with their ethical responsibilities. Petitioner has not merely expressed an opinion; rather, he has committed acts illegal under Florida law, he has stated on his own television show that engaging in such illegal activity is an acceptable form of recreational activity and he advised The Florida Bar Grievance Committee entertaining this cause initially that, given the opportunity, he would make such illegal bets again. Disciplining such conduct should be regarded as well within the broad power of Respondent The Florida Bar to ensure adherence by attorneys to the ethical principles which govern the profession in the State of Florida.

ARGUMENT

The issue is not, as Petitioner poses it, whether Respondent The Florida Bar may selectively enforce disciplinary rules solely because an attorney expresses an opinion. It may not, and Respondent does not claim such authority. Rather, the real issue is whether Respondent, an integrated bar association, may discipline an attorney, an officer of the court, where he engaged in betting activities illegal under Florida law, *see* § 849.14, Fla. Stat., where he stated on his own television show that placing bets on football games is an acceptable recreational activity, where he stated on that same show that he knew he was committing a misdemeanor offense by placing such bets, where he admitted that he had facilitated others in making such illegal bets, where he engaged in illegal

gambling over a lengthy period of time involving a substantial amount of money, and where he advised a Florida Bar Grievance Committee that, given the opportunity, he would make illegal bets again. When the case is viewed in this light, Respondent suggests that there are no substantial First Amendment issues involved here and that the discipline imposed, i.e., a public reprimand, was entirely appropriate.

It is important, too, to place the Petitioner's argument in its proper context. He does not appear to be arguing that he is immune from any type of discipline by Respondent. In fact, he could not plausibly do so, for it is well established in Florida law that the commission by an attorney of any act contrary to honesty, justice, or good morals, whether the act is committed in the course of his relations as an attorney or otherwise, whether committed within or without Florida, and whether or not the act is a felony or misdemeanor, constitutes a cause for discipline. Rule 4-8.4 of the Rules Regulating The Florida Bar. Rather, Petitioner only argues that he cannot be punished to a greater degree solely because he expressed an opinion.

However, it is by no means certain from this record that Petitioner's alleged "expression of opinion" is the sole basis for his more exacting punishment, i.e., a public reprimand as opposed to a private reprimand or no punishment for six (6) other attorneys in the Pensacola area involved in placing similar illegal bets in varying degrees. The Referee below expressly observed that the details of these other cases were not known to him; therefore, there is no factual basis on this record to infer

that Petitioner is being subjected to harsher punishment merely because of his expression of opinion.

Of equal importance, it should also be noted that Petitioner assisted other third parties in their efforts (which soon became costly for them) to place similar illegal bets. In other words, he conspired with these third parties to break the law; hence, it can hardly be argued that his bookmaking constitutes a "victimless crime." He engaged in illegal gambling activities over a lengthy period of time involving large sums of money. Petitioner's seeming lack of remorse also appears to have weighed quite heavily against him. As the Referee expressly found:

> It appears (Petitioner's) attitude at the time may have differed considerably from that of the attorneys who received lesser or no discipline. He saw nothing wrong with breaking the law because he felt it was a bad law to begin with.

Lack of remorse on the part of the accused has traditionally been regarded in our legal culture as providing an ample justification for a harsher sentence, and it affirmatively appears here that the Petitioner did not feel remorse for his actions even though he fully understood their import. Indeed, far from feeling remorseful, he expressly testified before a Grievance Committee on September 20, 1990, that if he had the opportunity to place bets on football games again, he would continue to do so![2]

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[2] In his Appendix, Tab A-8, 9, Petitioner attempts to draw a comparison between his illegal betting activities and one of the hobbies of a member of this Court. He has apparently overlooked the fact that certain penny-ante games (e.g., poker, pinochle, bridge, etc.) do not constitute crimes under Florida law. §849.085, Fla. Stat.

Given these other, equally valid and compelling reasons for imposing a slightly harsher sentence on Petitioner, all of which were expressly noted by the Referee and supported by competent, substantial evidence of record, this Court need not assign any First Amendment concerns to this case. In other words, since it can be resolved on purely non-constitutional grounds, this Court's review or intervention is not necessary or appropriate. These admitted facts, moreover, completely undermine his claim that he has been selectively prosecuted for his alleged expression of opinion.

Even if the Court finds some First Amendment implications in Petitioner's conduct and statements, Respondent suggests that those implications are not substantial and are more than outweighed by Respondent's legitimate interest in ensuring that attorneys engage in conduct consistent with their ethical responsibilities. As this Court has noted:

> The States enjoy broad power to regulate "the practice of professions within their boundaries," and "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' "

In Re Primus, 436 U.S. 412, 422 (1978), quoting with approval *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975).[3] To like effect is *In Re Snyder*, 472 U.S. 634, 644-645 (1985), where this Court held:

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[3] The issue in Primus was whether a State may punish an attorney who, seeking to further political and ideological goals

(Continued on following page)

> As an officer of the court, a member of the bar enjoys singular powers that others do not possess; by virtue of admission, members of the bar share a kind of monopoly granted only to lawyers. Admission creates a license not only to advise and counsel clients, but also to appear in court and try cases; as an officer of the court, a lawyer can cause persons to drop their private affairs and be called as witnesses in court, and for depositions and other pretrial processes that, while subject to the ultimate control of the court, may be conducted outside courtrooms. *The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice.* [e.s.]

Given this historical role of the attorney as an "officer of the court," Respondent believes that its legitimate concerns about Petitioner's admitted misconduct far outweigh the ephemeral First Amendment issues he is asserting. As former Justice Potter Steward once observed, "[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." *In Re Sawyer*, 360 U.S. 622, 646-647 (1958) (Stewart, J., concurring).

(Continued from previous page)

through associational activity, including litigation, advises a lay person of her legal rights and, through separate correspondence, advises that lay person that free legal assistance is available from the attorney and her organization. 436 U.S. at 414. Here, by comparison, the Court is not confronted by an attorney who is attempting to advance political or ideological goals but rather by one who has committed a garden variety crime about which he not only lacks remorse, but also avers he will do again if given the opportunity.

Indeed, in his concurring opinion in *Sawyer*, Justice Stewart employs a very useful and instructive analogy, where he expresses "doubt that a physician who broadcast the confidential disclosures of his patients could rely on the constitutional right of free speech to protect him from professional discipline." *Id.* at 647. Similarly, Respondent suggests an attorney who makes the kind of statements that Petitioner did on his own television show and then compounds his misconduct by affirmatively representing to the local Grievance Committee that given the opportunity he would engage in the similar misconduct in the future and by justifying his offense by asserting the particular law is a bad one to begin with, should not be allowed to rely upon the constitutional right of free speech to protect him from discipline by Respondent.[4]

To give him that immunity under these circumstances would be a poor signal not only to the legal profession but also to a public already concerned about attorney discipline that such egregious misconduct can be excused on such problematic First Amendment grounds. Therefore, even if the court is inclined to find some constitutional dimension to this case (which, as the discussion above demonstrates, it should not), it should still conclude that the Respondent has not exceeded its "broad power" to ensure adherence by "officers of the court" to the ethical principles which govern the profession.

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[4] "[A]ttorneys have traditionally been held to a higher standard than laymen." *Disciplinary Board v. Lowell*, 292 NW 2d 76, 121 ALR 4th 61 (N.D. 1980).

CONCLUSION

The question here presented does not involve the constitutional dimensions claimed by Petitioner. He has been disciplined because he engaged in betting activities illegal under Florida law, because he stated on his own television show that placing bets on football games is an acceptable recreational activity, because he admitted that he knew he was committing a misdemeanor offense by placing such bets, because he conspired with third parties to enable them to place similar illegal bets, and because he, an officer of the court, stated to his local Grievance Committee that breaking such a law is permissible where the law is a bad one to begin with. Clearly, the discipline imposed upon Petitioner is more than justified by these admitted facts. Furthermore, even if the court does find in this case some First Amendment issues, it should still decline to accept jurisdiction because those plainly insubstantial First Amendment issues are more than outweighed by Respondent The Florida Bar's legitimate concern over ensuring adherence by attorneys to the ethical principles which govern the profession.

Respectfully submitted this 5th day of June, 1991.

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APPENDIX

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs.

FREDERIC G. LEVIN,

Respondent.
_____/

CASE NO. 74,443
[TFB Case No.
87-27,937 (O1A)]

REPORT OF REFEREE

I. *Summary of Proceedings:* Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules Regulating The Florida Bar, hearings [sic] were held on January 16 and 17, 1990, in Pensacola, Florida. The pleadings, Notices, Motions, Orders, Transcripts and Exhibits all of which are forwarded to The Supreme Court of Florida with this report, constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar – David G. McGunegle, Bar Counsel and Mimi Daigle, Assistant Bar Counsel.

For the Respondent – Alan H. Rosenbloum.

II. *Findings of Fact as to Each Item of Misconduct of which the Respondent is charged.* After considering all the pleadings and evidence before me, pertinent portions of which are commented on below, I find:

1. The respondent routinely engaged in illegal gambling activities involving placing bets on the outcome of football games. This occurred over a period of time of at least five years through late 1986. The respondent placed his wagers through a bookmaker in the Pensacola, Florida area. The

wagers ranged between $500.00 and $2,000 nearly every weekend during the 1986 football season with some weekend totals reaching upwards of $6,000.

2. The respondent was aware that betting on football games was and is illegal in the State of Florida. Section 849.14 of The Florida Statutes makes it a second degree misdemeanor. He viewed betting on football games as his form of recreation. He expressed the attitude that it was an activity engaged in by many residents in the state and that the law was not routinely enforced.

3. Capt. Gerald Gigon and his wife Patricia were friends of the respondent. Mrs. Gigon had also consulted with the respondent concerning an unrelated legal matter from an accident in North Carolina. During a social conversation the respondent casually mentioned that he bet on football games. Capt. Gigon and his wife apparently had been interested in learning how to place bets on football games for quite some time and requested his help.

4. The respondent facilitated the Gigons in placing bets. He did not, however, entice them to engage in this activity. When it became too costly for them, he urged they stop.

5. Initially, the respondent placed bets for the Gigons through his bookmaker. Thereafter, he provided the Gigons with the bookmaker's telephone number and they began placing their own bets.

6. At least with respect to the Gigons, the respondent permitted bets to be delivered to his law office in Pensacola, Florida and the payoffs as well. It appears other wagers including his and his brother's went through the office.

7. The respondent's illegal betting activities did not cease until late fall 1986 when his bookmaker was arrested.

8. On or about March 5, 1987, and again on August 19, 1987, the respondent appeared on his own television show "LAWLINE", as televised on "BLAB TV" a local television station in Pensacola, Florida.

9. During both aforementioned television shows, the respondent stated that he engaged in illegal gambling activities by placing football bets with a bookmaker. During the August 19, 1987 show, he asserted his belief on camera that placing bets on football games with a bookmaker was an acceptable recreational activity. He further admitted he knew he was committing a misdemeanor offense by placing such bets.

10. The respondent testified before the First Judicial Circuit Grievance Committee "A" on September 20, 1988, that if he had the opportunity to place bets on football games, he would continue to do so.

11. At least six other attorneys in the Pensacola area also were involved in placing similar illegal bets in varying degrees. Of these, two received private reprimands and the remainder were not disciplined by the Bar. The details of each case are not known to this Referee.

12. Respondent argued that the grievance committee conspired to embarrass him publicly. I find little evidence of this in the record. It appears the respondent's attitude at the time may have differed considerably from that of the other attorneys who received lesser or no discipline. He saw nothing wrong with breaking the law because he felt it was a bad law to begin with. Furthermore, he aired his views publicly through his television program. Further, although the respondent denied he was advocating breaking the law, he must have been aware his stature in the community could foster that impression as opposed the merely airing his opinion.

13. I find that the respondent repeatedly engaged in illegal gambling over a lengthy period of time involving a substantial amount of money. Respondent is an officer of the Court and as such is sworn to uphold the laws of the State of Florida. It is not acceptable for a member of the Bar to simply ignore a law with which he does not agree. Rather, he should work to have the law repealed by the State Legislature which, by his own admission he has not done.

14. I recognize that the respondent has a long and distinguished career in the practice of law. He has made many contributions to the community. Good deeds, however, do not excuse his routinely engaging in conduct he admittedly knew to be illegal.

III. *Recommendations as to whether or not the Respondent should be found guilty:* As to each count of the complaint I make the following recommendations as to guilt or innocence:

I recommend that the respondent be found guilty and specifically be found guilty of violating Article XI, Rule 11/02(3)(a) of The Florida Bar's Integration Rule for engaging in conduct that is contrary to honesty, justice, or good morals; Rule 11.02(3)(b) for engaging in conduct that constitutes a misdemeanor; and the following Disciplinary Rules of The Florida Bar' Code of Professional Responsibility; 1-102(A)(1) for violating a disciplinary rule; and 1-102(A)(6) for engaging in any other conduct that adversely reflects on his fitness to practice law.

IV. *Recommendation as to Disciplinary measures to be applied:*

I recommend that the respondent receive a public reprimand by personal appearance before the Board of Governors.

V. *Personal History and Past Disciplinary Record:* After the finding of guilty and prior to recommending discipline to be recommended pursuant to Rule 3-7.5(k)(4), I considered the following personal history and prior disciplinary record of the respondent, to-wit:

Age: 53
Date admitted to Bar: October 20, 1961
Prior Disciplinary convictions and disciplinary measures imposed therein: None
Other Personal data: Respondent has no minor dependents.

VI. *Statement of costs and manner in which costs should be taxed:* I find the following costs were reasonably incurred by The Florida Bar.

A. Grievance Committee Level Costs	
1. Transcript costs	$612.25
2. Bar Counsel/Branch Staff Counsel Travel Costs	90.72
B. Referee Level Costs	
1. Transcript costs	$**
2. Bar Counsel/Branch Staff Counsel Travel Costs	$458.47
C. Administrative Costs	$500.00
D. Miscellaneous Costs	
1. Investigator Expenses	$125.35
2. Copies of Videos/Cassettes	$ 27.21
TOTAL ITEMIZED COSTS:	$1,814.00

It (is) apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the respondent, and that interest at the statutory rate shall accrue and be payable beginning

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** Transcript costs for the final hearing are not yet known.

30 days after the judgment in this case becomes final unless a waiver it granted by the Board of Governors of The Florida Bar.

Dated this 6th day of February, 1990.

/s/ W. Fred Turner
W. FRED TURNER
Referee

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